ARTICLES

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The Canada-United States Free Trade Agreement

On January 2, 1988, Canada and the United States signed the Canada-United States Free Trade Agreement.[1] The FTA will create the largest

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1. The Canada-United States Free Trade Agreement, Dec. 12, 1987, 27 I.L.M. 281 (1988) [hereinafter FTA]. All unascribed references to "article," "annex," and "chapter" refer to articles, annexes, and chapters of the FTA. All unascribed references to "Party" refers to either Canada or the United States and to "Parties" to Canada and the United States. U.S. legislation implementing the FTA was passed by Congress and signed into law by President Reagan on September 28, 1988. United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 19 U.S.C. § 2112 note. While the FTA states that it shall enter into force on January 1, 1989, the U.S. legislation states that when the President "determines that Canada has taken measures necessary to comply" with the FTA, the FTA shall enter into force on or *after* January 1, 1989, upon an exchange of notes between the Parties. *Id.* § 101(b). This will not permit U.S. ratification if Canada has not ratified it by January 1, 1989.

free trade regime between two nations the world has known. The FTA regulates economic barriers between the Parties including tariffs, economic and investment irritants, and nontariff barriers. Its objective is to:

1. eliminate barriers to trade in goods and services between the territories of the Parties;
2. facilitate conditions of fair competition within the free-trade area;
3. liberalize significantly conditions for investment within this free-trade area;
4. establish effective procedures for the joint administration of the Agreement and the resolution of disputes; and
5. lay the foundation for further bilateral and multilateral cooperation to expand and enhance the benefits of this Agreement.[2]

The FTA formalizes the economic integration that has already taken place in North America. The Canada-United States trading exchange is the largest in the world, totaling U.S. $131.3 billion in merchandise and U.S. $30.1 billion in services in 1987.[3] The FTA eliminates trade and other economic barriers existing in the relationship while setting a new international pace and standard for trading nations.

I. Rules of Origin

The rules of origin are the linchpin of major portions of the FTA. They are designed to ensure that the benefits of the FTA are conferred only in respect of goods originating in the territory of one of the Parties.

Goods are regarded as originating in Canada or the United States if they are wholly obtained or produced there.[4] This designation includes, for example, the products of mining, agriculture, and fishing in either country, and goods produced exclusively from such products in either territory.

Where foreign materials have been used in the manufacture of merchandise, the determination of origin is made using a combination of customs classifications and value-added concepts. Goods are deemed to originate in the United States or Canada if they have been transformed there so as to be subject to a change in tariff classification satisfying conditions set out in annex 301.2 and the accompanying rules.[5] These conditions are based on the Harmonized Commodity Description and

2. *Id.* art. 102.
3. STATISTICS CANADA (1987).
4. FTA, *supra* note 1, art. 301.1.
5. *Id.* art. 301.2.

Coding System (the Harmonized System),[6] and specify the type of change (for example, from one heading to another) required for each type of good to qualify as originating in the territory where the processing occurs. The aim is to pinpoint changes in the production of goods that are physically and commercially significant. For certain types of goods, mainly assembled products, an additional value-added requirement exists: the value of materials originating in the United States or Canada, plus the direct cost of processing performed in either country, must constitute at least 50 percent of the total materials and direct processing costs.[7] In addition, special rules apply to certain particularly sensitive products, such as textiles and apparel, and steel and automotive products.[8]

Goods that fail these tests may nevertheless be treated as originating in the United States or Canada in certain circumstances.[9] Where goods would otherwise fail the tests because they were classified as unassembled or disassembled goods under the Harmonized System, or because the tariff subheading includes both the goods and their parts, they will still qualify if at least 50 percent (by cost, including certain associated costs) of the materials used originated in either territory.[10]

Some goods are specifically disqualified from duty-free treatment under the FTA. Goods will not qualify, despite a change of tariff classification, if they have subsequently undergone any processing or assembling outside the United States and Canada that improves their condition or value.[11] Goods merely shipped from one Party's territory to the other through a third country, however, are not thereby disqualified so long as they do not undergo any processing in the third county, other than transportation or action required to preserve them in good condition.[12] Moreover, goods do not acquire origin merely by virtue of simple packaging, or (except as otherwise provided) combining, or dilution, or any process of work "in respect of which it is established, or in respect of which the facts as ascertained clearly justify the presumption, that the sole object was to circumvent the provisions of [the Chapter]."[13]

6. The Harmonized Tariff System is an internationally agreed system of tariff classifications designed to simplify and standardize tariff classifications around the world. Developed between 1971 and 1983 by the Customs Cooperation Council in Brussels, the system was adopted by the United States in the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 418, 100th Cong., 2d Sess.

7. *See, e.g.*, FTA, *supra* note 1, annex 301.2, sec. XV.11.

8. *Id.* annex 301.2, sec. VIII-XVII.

9. *Id.* art. 301.2.

10. *Id.* annex 301.2(4).

11. *Id.* annex 301.2(2).

12. *Id.* art. 302.

13. *Id.* art. 301.3(c).

The FTA provides for the enforcement of the rules of origin by obliging each party to introduce a mandatory system of exporters' certifications of origin and written declarations by importers, enforceable by the same sanctions as applied to false statements or representations.[14] This provision will make it particularly important for importers and exporters to be able to apply correctly the difficult value-added criteria that will frequently be relevant.

Because the United States and Canada will retain separate customs authorities, inconsistencies may arise in the interpretation of the rules of origin. The FTA provides for consultation between the countries' customs administrations, and for the exchange of precedential decisions.[15] It also requires each Party to provide the same rights of review and appeal with respect to origin determinations as exist in relation to tariff classification.[16] Apart from inconsistencies between the customs administrations of each country, discrepancies could exist between the origin of goods for the purposes of the FTA, and the origin for the purposes of quota or voluntary restraint agreements involving allocation of import quantities to specific countries. Unless the same principles are applied, two origin statements might be needed for the same goods, one for the FTA and one for quota purposes.

II. Border Measures

Removal of tariffs and other obstacles to free trade is at the heart of the FTA's purposes. The FTA deals with tariffs, customs user fees, and other import and export restrictions, and makes necessary changes in other areas, such as drawback and waivers of customs duties.

A. Tariff Elimination

Each Party is prohibited from increasing any existing customs duty or introducing any new duty on goods originating in the other Party's territory, except where the FTA expressly allows it.[17] The FTA also provides for the progressive elimination by January 1, 1998, of customs duties on goods originating in the other's territory at three different rates.[18] The rate of elimination varies between different types of goods.[19] Duties on goods in Category A have to be eliminated altogether by January 1, 1989. Category A includes:

14. *Id.* annex 406(a).
15. *Id.* annex 406(C)(6).
16. *Id.* annex 406 (C)(7).
17. *Id.* art. 401.
18. *Id.* art. 401.2.
19. *Id.*

Automatic Data Processing Equipment
Leather
Telephone and Telephone Hand Sets
Motorcycles
Modems
Whiskey and Rum
Fur and Fur Garments
Animal Feeds
Unwrought Aluminum

Duties on Category B goods are to be removed in five equal annual stages commencing January 1, 1989, so that duties will be eliminated by January 1, 1993. Category B includes:

Paper and Paper Products
Furniture
After-Market Automotive Parts
Most Machines
Paints
Petroleum
Chemicals (excluding drugs and cosmetics)
Precious Jewelry
Explosives
Subway Cars

For Category C goods, there are ten annual stages, eliminating duties by January 1, 1998. Examples of Category C products are:

Steel
Rubber
Most Agricultural Products
Tires
Textiles and Apparel
Most Fish Products
Zinc
Instruments
Plastics
Most Wood Products
Appliances
Railcars
Alcoholic Beverages
Appliances
Precision[20]

The FTA also provides for certain goods to continue to receive duty-free treatment that existed at the date of signing the FTA. In addition, the FTA provides for consultations between the Parties with a view toward accelerating the elimination of duties on specific items by agreement between the Parties.[21] The United States Government has stated that it will, as a matter of priority, consider requests from interested private sector groups for the acceleration of tariff reductions.[22]

The chapter relating to tariff reduction and border measures has to be read in conjunction with specific provisions in other parts of the FTA.[23]

20. *Id.* annex 401.2.
21. *Id.* art. 401.5.
22. Statement of Administrative Action, submitted to Congress on July 25, 1988, at 23, United States-Canada Free Trade Agreement, H.R. Doc. 100-216, 100th Cong., 2d Sess. 185 (July 26, 1988).
23. FTA, *supra* note 1, ch. 4.

For example, the amount of apparel made from imported fabric that will qualify for duty-free treatment is limited.[24] For imports exceeding the permitted level, the goods are not duty-free, but duty drawback may be available. Special provisions also exist, for example, for large telephone switching equipment, and for temporary restoration of duties on fresh fruits and vegetables.[25] Moreover, in the circumstances described in the chapter entitled "Emergency Action,"[26] tariffs may be reimposed, or tariff reductions suspended, for limited periods.

B. Customs User Fees

The FTA prohibits the introduction of new customs user fees with respect to goods originating in the territory of the other Party.[27] It permits the United States to alter the level of its existing customs user fees, subject, however, to a provision for the staged elimination by January 1, 1994, of all such fees for goods originating in Canada.[28] The staged elimination is based on the user fee otherwise applicable on specified dates, whether or not it is different from the present level, or calculated differently (for example, transaction-based instead of ad valorem).

C. Drawback

"Duty Drawback" is a government program that enables manufacturers to reclaim duty paid on the import of goods that are subsequently exported, or incorporated into or directly consumed in goods that are subsequently exported. As from January 1, 1994, drawback may not be given in respect of goods exported to the other Party, except to the extent the Parties may agree otherwise.[29] Drawback also may not be given where the imported goods are substituted by domestic or other imported goods exported to the other Party.[30] The prohibition extends to drawback given in respect of anti-dumping or countervailing duties imposed by the other Party. Similar provisions apply to goods covered by foreign trade zones and the like.[31]

The FTA contains drawback exceptions for citrus products, and for imported fabric made into apparel that is exported to the other Party but does not qualify for duty-free treatment (see above).[32] Other exceptions

24. *Id.* annex 301.2, sec. XI.17.
25. *Id.* art. 702.
26. *Id.* ch. 11.
27. *Id.* art. 403.1.
28. *Id.* art. 403.3.
29. *Id.* art. 404.
30. *Id.* art. 404.2.
31. *Id.* art. 404.3.
32. *Id.* art. 404.8.

include one for goods exported to the other Party's territory in the same condition as when they were imported.[33] (Such goods would not, of course, qualify for duty-free treatment as between the Parties. Some goods may fall between the two exemptions in that they may have been processed to a certain extent so that they do not qualify for exemption from the drawback prohibition and yet fail to meet the duty-free requirements of the country of origin provisions.) A further exception covers dutiable goods imported into the United States or Canada from the other Party's territory, then re-exported (or incorporated into goods exported) to the territory of the other Party.[34]

D. Waiver of Customs Duties

Waivers of duties that are conditioned, explicitly or implicitly, on the fulfillment of performance criteria are defined so as to include various Canadian programs that benefit companies meeting certain levels of exports, substitution of domestic for imported goods, domestic purchases, or production with domestic content.[35] New waiver programs may not be introduced or extended after the date of approval of the FTA by the United States Congress.[36] In addition, they must be eliminated entirely by January 1, 1998.[37] If such a duty waiver not conditioned on performance has an adverse impact on the other Party or one of its companies or citizens, the Party granting the waiver must end it or make it generally available to any importer.[38] Special provisions exist in the FTA for trade in automotive goods and are discussed below.

E. Import and Export Restrictions

The Parties reaffirm their rights and obligations under the General Agreement on Tariffs and Trade (GATT)[39] with respect to prohibitions or restrictions on trade in goods.[40] Where GATT prohibits quantitative restrictions, this includes minimum export-price requirements, and (except as permitted in enforcing countervailing and anti-dumping orders and undertaking) minimum import-price requirements.[41]

33. *Id.* art. 404.4.
34. *Id.* art. 404.4(c).
35. *Id.* art. 405.
36. *Id.* art. 405.1.
37. *Id.* art. 405.2.
38. *Id.* art. 405.3.
39. *Opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194.
40. FTA *supra* note 1, art. 407.1.
41. *Id.* art. 407.2.

The FTA eliminates some import and export restrictions. Canada is to remove its embargo on used or second-hand aircraft as of January 1, 1989; the United States is to remove its embargo on lottery materials printed in Canada by January 1, 1993.[42] Other restrictions can be retained, however, such as U.S. restrictions relating to vessels involved in coastal trade, Canadian restrictions on fish exports, and United States and Canadian restrictions on log exports and on imports of agricultural produce in connection with domestic supply management or support programs.[43]

The FTA prohibits export taxes on goods exported to the other Party.[44] The Parties' rights under GATT to restrict exports in connection with short-term supply problems, domestic price control programs, or the conservation of resources are limited.[45] Any restriction on exports to the other Party must not (a) reduce the proportion of total exports previously made available to the other Party, (b) impose a higher price than applies to domestic sales, or (c) require disruption of the mix of goods or normal channels of supply to the other Party.

III. Technical Standards

The GATT Agreement on Technical Barriers to Trade[46] (which is reaffirmed in the FTA)[47] prohibits the Parties to it from applying technical standards in a discriminatory matter. The FTA extends this concept by prohibiting the maintenance or introduction of federal technical standards for goods, processes, or production methods that would create "unnecessary obstacles" to trade between the Parties.[48] The FTA provides that "unnecessary obstacles" shall not be deemed to be created if the demonstrable purpose of the requirement is to protect health, safety, essential security, the environment, or consumer interests, and the requirement does not exclude goods of the other Party that meet that objective.[49] (This clarification of the expression is drawn from section 401 of the Trade Agreements Act of 1979,[50] which implements the GATT Agreement on Technical Barriers to Trade.)

Each Party agrees, so far as possible, to make its standards-related measures and procedures for product approval compatible with those of

42. *Id.* annex 407.5.
43. These restrictions are scattered throughout the FTA. *See* chs. 14 (coastal trade), 12 (fish and logs) and 7 (agriculture).
44. *Id.* art. 408.
45. *Id.* art. 409.1.
46. GATT, MTN/NTM/W/192/Rev. 5 (1979).
47. FTA, *supra* note 1, art. 602.
48. *Id.* art. 603.
49. *Id.*
50. Pub. L. 98-573, 98 Stat. 2948.

the other Party, by recognizing the other Party's standards of the same scope as being technically identical or equivalent in practice.[51] Moreover, each Party must, at the request of the other, take reasonable measures available to it to achieve compatibility with respect to the requirements of private standards-related organizations within its territory.[52]

As well as the standards themselves, the procedures for their application are to be made compatible. The Parties may not require, as a condition of accreditation, that testing, inspection, or certification take place in their own territories.[53] The FTA provides for mutual recognition of the other Party's testing and certification facilities,[54] and each Party must, on request, provide a written explanation whenever it refuses to accept test results from bodies located in the other Party's territory relating to certification or product approval.[55] The FTA also includes provisions for exchanges of information, consultation, and further implementation.[56]

The provisions of the chapter relating to technical standards do not apply to agricultural, food, beverages, or certain related goods dealt with in Chapter 7, or to standards applied by provincial or state governments.[57] Standards relating to plywood, which were the subject of some debate during Congress's consideration of the U.S. implementing legislation, are contained in article 2008 and an exchange of letters dated January 2, 1988, between the United States Trade Representative (USTR) and the Minister of International Trade (Canada).

IV. Agriculture

During the negotiations the Parties recognized that the inclusion of a chapter in the FTA on agriculture would focus primarily on technical standards and barriers while attempting to improve multilateral markets for both countries, rather than attempting to achieve bilateral free trade in agricultural goods and products. This reflects the recognition of two issues:

(A) the fact that despite a significant amount of agricultural trade between the Parties, both countries are major producers and exporters of the same agricultural commodities and products; and

(B) the diversity and complexity of agricultural marketing both domestically and in the multilateral arena results in a more

51. FTA, *supra* note 1, art. 604.1.
52. *Id.* art. 604.2.
53. *Id.* art. 605.2.
54. *Id.*
55. *Id.* art. 606.
56. *Id.* arts. 607, 608.
57. *Id.* art. 601.

> complex interrelationship between tariffs and non-tariff barriers than those that pervade other sectors of trade in tangible goods.

For this reason, the FTA does not make the inroads toward open and unrestricted trade in the agriculture sector that it does in other chapters. To have made further inroads at the bilateral level would have been to ignore the fact that although bilateral agricultural trade disputes exist, the true challenge facing both countries exists at the multilateral level. For example, although Canada and the United States are leading producers and exporters of wheat, the challenge for each country is to maintain its respective world market share in light of increasing subsidization practices of third countries coupled with declining commodity prices created by certain European Economic Community (EEC) export policies.

Despite the foregoing comments, the Parties addressed certain bilateral issues and ultimately resolved them in the negotiations. For example, the United States perceived the Canadian practice of licensing imports of wheat, oats, and barley as an unjustified restriction on American imports into Canada. Another Canadian program that the United States perceived as an unfair trade practice was based on a transportation subsidy given to western Canadian farmers shipping grain and addressed under the Western Grain Transportation Act[58] (commonly referred to as Crow's Nest). For Canada, this program was justified as regional assistance as opposed to an unfair subsidy. In contrast, Canada felt unfairly discriminated against by the U.S. quantitative import restrictions of products containing low sugar content (less than 10 percent). The Canadian view was that although aimed against subsidized EEC products, the restrictions had a negative impact on Canadian exports to the United States.

The FTA focuses on agricultural subsidies and, in particular, centers on improved multilateral trade.[59] Specifically, the Parties acknowledge that their primary goal with respect to agricultural subsidies is to eliminate, on a global basis, subsidies that distort agricultural trade; they agree to work together in the Uruguay Round of the GATT to achieve this stated goal.[60] Bilaterally, the Parties agree not to introduce or maintain any export subsidy on agricultural goods originating in or shipped from it directly or indirectly to the other Party.[61] Additionally, both Parties agree that each will take into account export interests of the other country when utilizing an export subsidy to third countries where that subsidy may have

58. CAN. STAT. 1980-83, ch. 168, as amended.
59. *See* FTA, *supra* note 1, ch. 7.
60. *Id.* art. 701.1.
61. *Id.* art. 701.2.

a prejudicial impact on the export interests of the other Party.[62] Specifically, the Parties agree that they will not sell agricultural goods for export to the other country at less than the acquisition price of the goods plus any storage, handling, or other costs.[63] Finally, in relation to subsidies, Canada has agreed to eliminate the Crow's Nest railway transportation subsidies on agricultural goods shipped for export to the United States.[64]

Agricultural products are generally subject to tariff elimination over a period of ten years. In relation to fresh fruits and vegetables, however, the FTA permits either Party for a period of twenty years from implementation of the FTA to impose a temporary duty under certain circumstances.[65]

The FTA provides for the Parties to work together to improve access to each other's market through the elimination or reduction of import barriers.[66] In particular, specific provisions are contained in relation to market access for meat, grain and grain products, poultry and eggs, and sugar-containing products as follows:

(i) ***Meat***—Neither country may introduce or maintain import quotas or restrictions on meat goods unless such restrictions are necessary to maintain a quota or agreement established for meat goods from third countries. If the other Party has not taken equivalent action, the quota can only be applied to the other Party to the extent required to avoid frustrating the quota or agreement.[67]

(ii) ***Grain and Grain Products***—Canada has agreed to eliminate its import licensing requirements for wheat, oats and barley and their products as defined. The elimination is subject to the proviso requiring equalization of government support for production of these grains; i.e., equalization of United States support programs to those of Canada.[68]

(iii) ***Poultry and Eggs***—Canada is permitted to maintain its marketing board practices subject to an increase in import allowances.[69]

(iv) ***Sugar-Containing Products***—In reference to American sugar policy previously referred to herein, the United States has agreed not to introduce or maintain any import quota or fee on Canadian exports containing 10 per cent or less sugar (by dry weight).[70]

62. *Id.* art. 701.4.
63. *Id.* art. 701.3.
64. *See id.* art. 701.5.
65. *Id.* art. 702.
66. *Id.* art. 703.
67. *Id.* art. 704.
68. *Id.* art. 705 & annex 705.4.
69. *Id.* art. 706 & annex 706.
70. *Id.* art. 707.

Finally, the Parties have undertaken to cooperate with regard to harmonizing (to the greatest extent possible) technical regulations, standards, and inspection procedures and to establish special working groups and a joint monitoring committee.[71]

V. Energy

The Parties share the world's largest two-way energy trade, totaling in 1987 over U.S. $10 billion.[72] Canada is the largest foreign supplier of energy to the United States, providing 100 percent of American natural gas and electricity imports.[73] It is the largest supplier of uranium and petroleum to the United States. In turn, 30 percent of Canada's energy imports are from the United States.[74] The FTA reflects a significant commitment to the bilateral trade in energy. From the perspective of the United States this means "nondiscriminatory access" to Canadian energy supplies. On the Canadian side it means "secure market access" for Canadian energy exports. The FTA formalizes and stabilizes the open market that currently exists in several energy sectors while addressing particular bilateral concerns.

After affirming their rights and obligations under the GATT with respect to prohibitions or restrictions on bilateral trade in energy, the Parties prohibit most bilateral trade restrictions.[75] In summary, the Parties have agreed to eliminate import restrictions, fees, and minimum import price requirements for oil, gas, coal, electricity, uranium, and related energy products.[76] The Parties further provide for the elimination of export restrictions such as export taxes, charges, minimum export price requirements, and volume restraints.[77] Either Party, however, may impose restrictions on trade in energy products with third countries as follows:

(i) limiting or prohibiting the pass-through of prohibited goods of a third country into its territory; and
(ii) requiring that the energy goods exported to the other Party be consumed within that territory of the other Party.[78]

Additionally, either Party may request consultation when the other imposes a restriction on third country energy imports in order to avoid

71. *Id.* art. 708 & annex 708.1.
72. *See* CANADA, PARTNERS IN FREE TRADE (1988).
73. *Id.*
74. *Id.*
75. FTA, *supra* note 1, art. 902.1.
76. *See id.* art. 902.2.
77. *See id.* arts. 902.2, 903.
78. *Id.* art. 902.3.

interference with or distortion of pricing, marketing, and distribution arrangements of the other Party.[79]

The open border measures of the FTA are subject to a proviso that the exporting Party must provide proportional access to energy goods when actual or expected shortfalls exist or measures are taken to prevent exhaustion of a finite energy resource.[80] When a Party imposes restrictions under this provision, it may not impose a higher price for exports of a restricted energy good than when considered domestically.[81] This proviso builds on both countries' long-standing international commitments. In 1974 Canada and the United States, together with certain OECD countries, entered into the Agreement on the International Energy Program, which is intended to increase the self-sufficiency of participating countries in energy supplies and provide for energy sharing in times of emergency. The FTA reaffirms Canada's and the United States' acknowledgment of the interdependence of the international economy and the severe global consequences of energy shortages.

Additionally, Canada has agreed to eliminate what is described as a "discriminatory" price test on electricity exports to the United States.[82] As a result, electricity exports will no longer be required to be priced above the lowest price available from local American suppliers. Nevertheless, they cannot be priced lower than Canadian production costs or prices charged other Canadian utilities. In order to maintain a reserve base for energy resources, the Parties agree to permit existing and future incentives for gas and oil exploration and development.[83]

The FTA also contains a national security exemption.[84] This provision, while more narrow than permissible under the GATT or other chapters of the FTA, permits measures restricting trade in energy goods with the other Party where necessary to:

(i) supply a military establishment of a Party or enable fulfillment of a critical defense contract of a Party;
(ii) respond to a situation of armed conflict involving the Party taking the measure;
(iii) implement national policies or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices; or

79. *Id.* art. 902.4.
80. *See id.* art. 904.
81. *Id.*
82. *See id.* annex 905.2.
83. *Id.* art. 906.
84. *Id.* art. 907.

(iv) respond to direct threats of disruption in the supply of nuclear materials for defense purposes.[85]

VI. Automotive[86]

Automotive trade (completed vehicles and parts) is the cornerstone of the trade relation between the Parties. In 1987 it totalled approximately U.S. $41.9 billion[87] in two-way trade and comprised approximately 35 percent of all Canadian exports to the United States and 40 percent of American exports to Canada. During the past twenty-three years the Agreement Concerning Automotive Products[88] (the Automotive Agreement) has altered the structure of the North American automotive industry and bilateral trade between the Parties. The Automotive Agreement was a vital response to a complex trade situation that threatened the entire structure of Canada-United States trade in the early 1960s.

The FTA contains key provisions relating to motor vehicles and parts.[89] It preserves the existence of the Automotive Agreement[90] and provides that both countries shall endeavor to administer the Automotive Agreement in the best interest of employment and production of both Parties.[91] Upon the implementation of the FTA, trade in automotive goods will effectively be conducted under both the FTA and under the Automotive Agreement. The provisions, however, limit the benefits of the Automotive Agreement to those Canadian manufacturers set forth in the FTA (the list to be finalized within ninety days of the 1989 model year).[92] A manufacturer will lose its designation as a qualified Canadian manufacturer under the Automotive Agreement if:

(1) effective control of the conduct and operation of the business or substantial ownership of its assets is acquired, directly or

85. *Id.*

86. For a detailed analysis of the Canada/U.S. automotive trade and the FTA see: Battram, *Automotive Productions: The Cornerstone of North American Trade,* in UNITED STATES/CANADA FREE TRADE AGREEMENT: THE ECONOMIC AND LEGAL IMPLICATIONS 359-76 (ABA 1988).

87. STATISTICS CANADA, *supra* note 3.

88. Agreement Concerning Automotive Products Between the United States and Canada (with Annexes) (Jan. 16, 1965), 17 U.S.T. 1372, T.I.A.S. No. 6093. U.S. implementation was effected by Automotive Products Trade Act of 1965, Pub. L. No. 89-283, 79 Stat. 1016 (codified as amended at 19 U.S.C. §§ 2001-2033 (1982)).

89. FTA, *supra* note 1, chs. 3, 10.

90. It is interesting to note that while the FTA only refers to the "Automotive Agreement," Canadian Government commentary preceding Chapter 10 refers to the "Auto Pact." The Auto Pact, however, is broader than the Automotive Agreement and includes the Automotive Agreement, Letters of Undertaking of the Canadian manufacturers, and the implementing legislation in each country.

91. FTA, *supra* note 1, art. 1001.

92. *Id.* art. 1002.1 & annex 1002.1, pt. 1.

indirectly, by a manufacturer that is not listed in the FTA; and

(2) the fundamental nature, scope or size of the business of the recipient is significantly altered from the business as carried on immediately prior to the acquisition of control or change in ownership.[93]

Waivers of duty remission granted for those manufacturers listed, which give credit for automotive equipment parts purchased from Canadian manufacturers, shall exclude exports to the territory of the other Party after January 1, 1989, and terminate completely on all exports on or before January 1, 1998.[94] Waivers of duty remission granted as production incentives for listed automotive manufacturers outside the Automotive Agreement that give credit for Canadian value added in vehicles assembled in Canada, shall terminate not later than January 1, 1996, or at such earlier dates specified in existing agreements between Canada and the actual recipient of the waiver.[95]

As in the situation under the Automotive Agreement, the treatment of each Party in relation to automotive products is slightly different. The rules of origin in the FTA, which provide for 50 percent Canadian-U.S. content, apply to all automotive goods exported from Canada to the United States whether or not the exporting party is an Automotive Agreement designated manufacturer.[96] Manufacturers who do not have Automotive Agreement status will be accorded duty-free access at the end of the transition period on goods exported to Canada provided they meet the 50 percent rule-of-origin level.[97] In the interim, by complying with the 50 percent rule of origin they can have the benefits of the declining tariffs. Canadian manufacturers who are qualified under the Automotive Agreement and listed in the FTA can continue (presumably upon compliance with the letters of undertaking given "voluntarily" to the Canadian Government at the time the Automotive Agreement was implemented) to import duty-free into Canada from the United States motor vehicles and original equipment parts under the Automotive Agreement.

VII. Emergency Action

A. "Bilateral" Action

If any of the reductions in duties provided for in the FTA cause an increase in the absolute quantity of any type of goods being imported into

93. *Id.*
94. *Id.* art. 1002.2.
95. *Id.* art. 1002.3.
96. *Id.* art. 1005.1.
97. *Id.* art. 1005.1(a).

a Party's territory, and if those imports alone are a substantial cause of serious injury to a domestic industry producing a like or directly competitive good, the affected Party can take emergency action to the extent necessary to remedy the situation.[98] In such circumstances, the importing Party may, so far as necessary to remedy the injury, suspend further duty reductions pursuant to the FTA, or increase duty to the lesser of the most-favored-nation (MFN) rate in effect at that time or the MFN rate in effect the day before the FTA enters into force.[99] Where the duty is seasonal, the increased rate must not exceed the MFN rate in effect for the corresponding season immediately before the FTA enters into force.[100]

Important restrictions apply to this right. It cannot be invoked without notification and consultation, and the emergency measures cannot be maintained for more than three years.[101] They can neither continue beyond the expiration of the ten-year transition period nor be instituted after that period without the other Party's consent.[102] Only one such action can be taken in respect of any type of goods during the transition period, and on the termination of the action the rate of duty must revert to the rate that would otherwise have applied.[103]

Furthermore, the Party taking the action must provide agreed trade-liberalizing compensation in the form of concessions "having substantially equivalent trade effects" or that are equivalent to the value of the additional duties expected to result from the action.[104] Not surprisingly, there is a default provision: if the Parties cannot agree, the exporting Party can engage in "self-help" compensation by taking tariff action with substantially equivalent trade effects to the emergency action taken by the other Party.[105]

B. "Global" Action

The FTA also contains provisions, not restricted to the transition period, dealing with emergency action taken on a global basis.[106] It restricts each Party's rights under article XIX of GATT by providing that the other Party must be excluded from any such action except in specified circumstances. To be swept up in a global emergency relief action, imports from the other Party must be substantial and an important cause, although not

98. *Id.* art. 1001.1.
99. *Id.* art. 1101.1(a).
100. *Id.* art. 1101.1(b).
101. *Id.* art. 1101.2.
102. *Id.*
103. *Id.*
104. *Id.* art. 1101.4.
105. *Id.*
106. *Id.* art. 1102.

necessarily the most important cause, of serious injury or threat of injury to the domestic industry.[107] Imports of less than 10 percent of total imports are not normally considered to be substantial.[108]

Where global action initially excludes the other Party, the Party taking the action can subsequently include the other Party if the effectiveness of the action is undermined by a significant increase in imports of the goods from the other Party (an increase, that is, over the trend for a reasonable recent base period).[109] As in the case of "bilateral" action, there are restrictions on the use of emergency measures. If a Party includes the other Party in global action either at the outset or subsequently, the initiating Party must give prior notice and allow for consultation, and the restrictions must not reduce imports in the goods from the other Party below the trend of imports over a reasonable recent base period, with allowance for growth.[110] Provisions for compensation or retaliation are also included, similar to those outlined above applicable to "bilateral" actions.[111]

C. Generally

The arbitration and panel provisions of the dispute resolution chapter[112] do not apply to proposed emergency actions.[113] The Parties must refer to arbitration any dispute concerning actual action that is not resolved by consultation.[114]

The FTA, in effect, defines the extent to which Canada is exempted from the United States' "escape clause" actions, known as section 201 actions.[115] United States bilateral agreements have frequently included escape clause provisions. Indeed, Executive Order 9832, issued in 1947,[116] required an escape clause to be included in all subsequent trade agreements. The FTA restricts the application of section 201 in important respects. It covers Canadian imports only when such imports exceed ten percent of all U.S. imports of the goods in question.[117] Although the same rule applies to Canadian escape clause cases involving imports from the United States, Canada is likely to benefit more from the provisions than

107. *Id.* art. 1102.1.
108. *Id.*
109. *See id.* art. 1102.2.
110. *Id.* arts. 1102.3, 1102.4.
111. *Id.* art. 1102.5.
112. *Id.* ch. 18.
113. *Id.* art. 1103.
114. *Id.* arts. 1103, 1806.
115. 19 U.S.C. § 2251 (1982 & Supp. IV 1986).
116. 3 C.F.R. § 126 (Supp. 1947).
117. FTA, *supra* note 1, art. 1102.1.

the United States. Imports from Canada constitute in general a smaller proportion of U.S. imports than do imports from the United States in Canada. United States exports to Canada are thus more likely to exceed the quantitative prerequisites for inclusion in global emergency action.

VIII. Government Procurement

A. Introduction

The general principles of the FTA regarding government procurement can be reduced to four basic undertakings: (1) expanding national treatment, (2) enhancing transparency and competitiveness, (3) extending GATT coverage, and (4) committing to further negotiations on procurement issues.

B. Relation to the GATT Code

Several articles establish the relationship between the FTA procurement provision and the GATT Government Procurement (the Procurement Code). The FTA reaffirms the Parties' rights and obligations under the Procurement Code[118] and provides that the Procurement Code (as modified by the FTA) be incorporated into and made part of the FTA.[119] Any modifications to the Procurement Code are automatically incorporated into the FTA unless otherwise specified. Furthermore, in the event of an inconsistency between the provisions of the Procurement Code and the obligations of the FTA, the obligations of the FTA will apply.

The FTA procurement provisions apply to government procurements that are below the Procurement Code threshold. Specifically, paragraph 1 of article 1304 provides that the FTA applies "to procurements specified in Code Annex I [reproduced in Annex 1304.3] . . . that are above a threshold of twenty-five thousand US dollars . . . and below the Code threshold [i.e., 130,000 SDR]."[120]

C. Principal Obligations

The FTA sets forth the expanded procedural obligations, including national treatment, for each country's eligible goods covered by the FTA.[121]

118. *Id.* art. 1302.

119. *Id.* art. 1303. In addition, art. 1308 specifically states that article VIII of the Code (exceptions to the Code based on national security, public health or safety, protection of intellectual property, etc.) applies to this chapter.

120. Paragraph 2 of art. 1304 clarifies the procedure for converting the U.S. $25,000 threshold to Canadian dollars. The conversion rate is based on the average weekly value of the Canadian dollar over a prior two-year period.

121. FTA, *supra* note 1, art. 1305.

In the area of national treatment, both Canada and the United States agreed to eliminate "buy national" restrictions on procurement of "eligible goods"[122] by Procurement Code-covered entities[123] that fall below the monetary threshold for Procurement Code coverage but are above U.S. $25,000.[124] As a floor, the FTA also requires each Party, for covered procurement: (1) to provide equal access to pre-solicitation information; (2) to permit equal opportunity to compete in the pre-notification phase of the procurement cycle; (3) to provide equal opportunity to potential suppliers to be responsive to the procurement requirements in the tendering and bidding phase; (4) to use decision criteria in the supplier qualification, bid evaluation, and contract award phases that best meet the requirements specified in the tender document and are free from preferences; (5) to notify publicly these criteria in advance; and (6) to promote competition by making information available on contract awards in the post-award phase.[125]

The chapter also requires each Party to establish and maintain equitable, timely, transparent, and effective bid challenge procedures.[126] In so doing, each country is to be guided by certain principles set forth in annex 1305.3 to the FTA. These principles permit bid challenges on any aspect of the procurement process covered by the chapter, up to and including the

122. For purposes of the FTA, "eligible goods" means "unmanufactured materials mined or produced in the territory of" Canada or the United States, as well as materials manufactured in those respective territories if the cost of the goods originating outside those territories and used in the materials is less than 50 percent of the total cost of goods used. "Territory" of the United States does not include leased bases or trust territories. For Canada, "territory" means the territory to which Canadian customs laws apply. FTA, *supra* note 1, art. 1309.

123. For Canada, twenty-two federal departments and ten federal agencies are covered. The only major exclusions are the transport, communications, and fisheries and ocean departments. The Defense Department is included only for purchases of non-military products. The United States also has designated approximately fifty-five federal departments, agencies, and boards as covered entities. The only federal agencies excluded are energy and transportation. The General Services Administration, the government purchasing agency, is included in the agencies. The Defense Department is only included for defined product categories such as vehicles, engines, industrial equipment, computer software, and commercial supplies. FTA, *supra* note 1, annex 1304.3. Both Parties reserve the right to invoke national security considerations as a reason for closing certain competitions to the other. *Id.* art. 1308.

124. Under the original GATT Government Procurement Code, procurement that had a value of 150,000 SDRs (Special Drawing Rights) were covered by the Procurement Code rules. Smaller procurement fell outside the Code. The 150,000 SDR threshold recently was lowered to 130,000 SDR. This new figure translates into approximately U.S. $156,000 or Can $218,000.

Note: Given recent fluctuations and devaluations of the U.S. dollar, the currency conversions contained herein may change as of the time of publication.

125. FTA, *supra* note 1, art. 1305.2.

126. *Id.* art. 1305.

contract award.[127] Prior to initiating a challenge, however, a supplier should be encouraged to seek resolution of the complaint.[128] A supplier's attempt to seek resolution (whether successful or not) does not prejudice its ability to go forward and seek relief through a bid challenge.[129]

The procurement body involved in a complaint or bid challenge is to accord impartial and timely consideration to the supplier's complaint or challenge.[130] The ultimate decision on the merits of a bid challenge, however, must lie with a reviewing authority that has no substantial interest in the outcome.[131] Upon receipt of a bid challenge, the reviewing authority must expeditiously investigate the challenge. This authority has the power to delay a proposed award pending resolution of the challenge, except in cases of urgency or where the delay would be prejudicial to the public interest.[132] In addition, the principles suggest that the reviewing authority should be empowered to make recommendations to procurement entities regarding the procurement process, including recommendations for changes to bring procedures into compliance with the obligations of the chapter. According to the principles, such recommendations should be followed by the procurement entities.[133] Decisions of the reviewing authority on a bid challenge are to be in writing and provided in a timely fashion to all interested persons.[134]

The Parties must specify in writing, and make available to all potential suppliers, the bid challenge procedures and time frames associated with these procedures as well as provide reasonable access to nonconfidential procurement information.[135] The Parties can change the bid challenge procedures provided such changes are in conformity with the chapter.[136] Furthermore, the United States and Canada must ensure that complete documentation and records regarding a procurement award are maintained in order to allow verification that the procurement process is in conformity with the obligations of the chapter.

The Parties are required to cooperate in monitoring the implementation, administration, and enforcement of the obligations of the chapter.[137] In addition to information requirements under the GATT Code, the Parties

127. *Id.* annex 1305.3(a).
128. *Id.* annex 1305.3(b).
129. *Id.* annex 1305.3(c).
130. *Id.* annex 1305.3(d).
131. *Id.* annex 1305.3(e).
132. *Id.* annex 1305.3(f).
133. *Id.* annex 1305.3(g).
134. *Id.* annex 1305.3(h).
135. *Id.* annex 1305.3(i).
136. *Id.* annex 1305.3(j).
137. *Id.* art. 1306.

must collect and exchange annual statistics on the procurement covered by the chapter.[138] Reports must identify the country of origin of goods covered under the chapter, give the total government procurement by procurement entity and product category, and provide single tendering statistics for each procurement entity.[139] Requests for exchanges of other information are to be given "sympathetic consideration."[140]

IX. Services

The FTA establishes the first comprehensive international understanding concerning trade in services between nations.[141] In summary, it provides for the right of national treatment for most commercial service industries (with certain exceptions of transportation, basic telecommunications, lawyers, doctors, dentists, child care, and government-provided services). Additionally, separate annexes relating to enhanced telecommunications and computer services, tourism, and architectural services are included.[142] Scope is provided for the Parties to negotiate additional sectoral annexes.[143]

The basic principle of the services provisions is premised on the concept of national treatment.[144] In principle the Parties extend national treatment to providers of listed commercial services.[145] Essentially, the Parties have agreed not to discriminate between Canadian and American providers of these services. Each Party undertakes at the federal and state or provincial level not to treat persons of the other country less favorably in the performance of services than their own persons.[146] This agreement, however, is not an undertaking to harmonize regulatory regimes. Each Party may continue to treat or regulate a service sector differently from the other nation provided that such treatment or regulation does not discriminate between Canadians and Americans.[147] A significant exception to the national treatment provision allows provinces or states to discriminate against persons of the other country so long as they also discriminate against nonresidents of the particular state or province within their own country.[148]

138. *Id.* art. 1306.2.
139. *Id.*
140. *Id.* art. 1306.3.
141. *See id.* ch. 14.
142. *Id.* annex 1404, sectoral annexes A, B & C.
143. *Id.* art. 1405.1(b).
144. *Id.* arts. 105, 1402.1.
145. *Id.* annex 1408.
146. *Id.* arts. 1402.1, 1402.2.
147. *Id.* art. 1402.3.
148. *Id.* art. 1402.2.

The national treatment provision is subject to permissible differential treatment for legitimate purposes such as consumer protection or safety provided that notice is given by one Party to the other.[149] Another exception to the national treatment concept exists in relation to nonconforming provisions of any existing measure. The obligations under the FTA are prospective and do not require either Party to amend existing laws or regulations.[150] Neither party, however, can in the future amend any existing laws or regulations to be more discriminatory. A final exception to the national treatment concept exempts new taxation measures. The exception is subject to a proviso that new tax measures cannot constitute "arbitrary or unjustifiable discrimination" or a "disguised restriction on trade in covered services."[151]

The FTA provides that each Party will continue to license and regulate covered services in relation to competence and ability.[152] Such licensing requirements, however, cannot act in a discriminatory manner to impair or restrain the provision of services by nationals of the other Party.[153] Finally, the FTA acknowledges the desirability of mutual recognition of licensing certification requirements of the covered service sectors.[154]

As in the rules of origin for tangible goods, the FTA limits the benefit of the services chapter to providers who are residents of Canada or the United States. Either Party may deny benefits of the services chapter to persons of the other country if it can demonstrate that a particular service is in fact being indirectly provided by a national of a third country.[155]

Finally, neither party can introduce any measure requiring the establishment of a commercial presence by a person of the other Party as a condition of providing services, if such requirement is a "means of arbitrary or unjustifiable discrimination" or a "disguised restriction on bilateral trade in covered services."[156]

The economic benefits that are likely to be realized by reducing barriers to trade in services are difficult to quantify, but they are certain to be substantial. The services chapter is a very significant achievement for both Parties, although more particular for its future promise than for its current reality. Not only have the United States and Canada set the tone for negotiation of services in the Uruguay Round of the GATT, they have

149. *Id.* art. 1402.3(c).
150. *Id.* art. 1402.5.
151. *Id.* art. 1407.
152. *Id.* art. 1403.1.
153. *Id.* art. 1403.2.
154. *Id.* art. 1403.3.
155. *Id.* art. 1406.1.
156. *Id.* art. 1402.8.

also established the bottom line of any acceptable international services agreement.

X. Immigration

In the FTA the Parties give reciprocal undertakings regarding temporary entry into each other's country by citizens of the other Party for business purposes.[157] These changes reflect the special trading relationships between the Parties and the desirability of establishing clear criteria and procedures for facilitating temporary entry while, at the same time, ensuring security and protection of permanent employment for each other's labor forces.[158] Facilitating temporary entry for business purposes will be particularly important in the service sector. The FTA also provides for temporary entry of business persons, designated professionals, traders and investors, and intra-company transfers.[159]

The provisions relating to traders and investors and intra-company transfers will eliminate much of the uncertainty in seeking temporary entry for business purposes, although a noninvestor applicant must be entering to carry on substantial trade between the United States and Canada[160] and must be taking up an "executive or supervisory" position or one that involves "essential skills."[161] Virtually all of the criteria currently used by Canadian and U.S. immigration authorities contain subjective elements of judgment. The FTA makes a significant inroad in the elimination of the uncertainty in identifying and moving Canadian and American executives between the Parties.

XI. Investment Issues and the Free Trade Negotiations

Canada and the United States are significant investment partners of each other. The United States is the largest source for foreign investment in Canada;[162] Canada is the fourth largest source in the United States.[163]

Although one cannot quantitatively measure the correlation between trade and investment, these two economic sectors are intertwined in the development of Canada's manufacturing base, particularly in relation to the United States. Additionally, many of the irritants in Canadian-American investment relations have arisen because of the economic conse-

157. *Id.* art. 1501.
158. *Id.*
159. *Id.* art. 1502 & annex 1502.1.
160. *Id.* annex 1502.1.
161. *Id.*
162. STATISTICS CANADA, *supra* note 3.
163. Information from United States Department of Commerce.

quences in Canada of trade barriers (both tariff and nontariff) established to protect domestic industry. These barriers, in turn, led to the high degree of foreign ownership in Canada.

While historically Canada has generally been an extremely hospitable country for American direct investment, its government has sometimes appeared indecisive on whether further foreign direct investment (FDI), and in particular American investment, should be encouraged. In the late 1960s and early 1970s the political and regulatory climate in Canada was relatively hospitable. During the last twenty years the government has sponsored three studies of FDI in Canada, the latest resulting in a restrictive approach to foreign investment administered by the Foreign Investment Review Agency (the Agency)[164] established in 1974. That was followed six years later with a National Energy Program, one of the stated objectives of which was to reduce foreign (in particular, American) ownership in the oil and gas industry. This nationalist mood waned during the recession years of 1982 and 1983, when the Liberal government streamlined the FIRA's screening procedures. The new policy direction continued after the election of the Conservative government in 1984, which instituted a narrower review process administered by Investment Canada and declared the country to be once again "open for business."

In entering into the negotiation of a free trade agreement with Canada, the United States identified Canadian regulation of FDI as a barrier that should be removed or substantially modified to provide improved access to Canada for American investors. The Investment Canada Act (ICA) is perceived in Washington as an unreasonable restriction on the entry of American investment in Canada and an unreasonable denial of "national treatment" to American-owned investments in Canada.[165] A stated objective of the free trade negotiations was to produce a Canadian policy environment as open to inflows of foreign direct investment as that of the United States.

The Parties have agreed, to the extent provided in the FTA, to accord national treatment to each other's investors with respect to investment and to trade in goods and services.[166] In particular, the Parties have agreed to provide "national treatment" to investors from the other Party in relation to the establishment of new businesses, the acquisition of existing businesses (subject to certain monetary thresholds discussed below), and the conduct, operation, and sale of established businesses.[167] With respect

164. Foreign Investment Review Act, ch. 46, 1973-4, Can. Stat. as amended [FIRA], repealed June 30, 1985, by the Investment Canada Act, ch. C-15, 1984-1985 Can. Stat. [ICA].

165. *See also* U.S. TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE: 1986 REPORT ON FOREIGN TRADE BARRIERS 57-59 (1986).

166. FTA, *supra* note 1, art. 105.

167. *Id.* art. 1602.1.

to a province or state, the treatment accorded by a Party under the "national treatment" concept shall be no less favorable than the most favorable treatment accorded by such province or state in like circumstances to investors of the Party of which it forms a part.[168] Neither Party shall impose on an investor of the other Party a requirement that a minimum level of equity be held by its nationals in a local business enterprise controlled by such investors.[169]

As an important exception to "national treatment," the FTA provides that any existing business or government-owned corporation (Crown Corporation) operated by Canada or a provincial government as of January 1, 1989, is exempted.[170] Consequently, in privatizing these businesses Canada can impose measures that on their face are inconsistent with the provisions relating to national treatment and minimum Canadian equity holdings.[171] This exception is limited by a proviso that prohibits Canada, once it has introduced such a "new measure," from amending it or introducing any subsequent measure that renders the original "new measure" more inconsistent with the concept of national treatment.[172] The exception also extends to any new measure relating to the direct or indirect ownership at any time of such business enterprise. Canada is not allowed, in the case of a new measure, later to increase ownership restrictions contained in it.

Finally, if Canada, a province, or a Crown Corporation establishes or acquires a business enterprise after the FTA enters into force, the provisions relating to national treatment and minimum equity holdings shall not apply to the subsequent acquisition of such enterprise as a result of its disposition by Canada, a province, or a Crown Corporation.[173] Once such subsequent acquisition has been completed, however, the provisions apply.

As a further departure from "national treatment," a Party may accord investors from the other Party differential treatment provided it establishes that:

(a) the difference in treatment is no greater than that necessary for prudential, fiduciary, health and safety, or consumer protection reasons;

(b) such different treatment is equivalent in effect to the treatment accorded by the Party to its investors for such reasons; and

168. *Id.* art. 1602.4.
169. *Id.* art. 1602.2.
170. *Id.* art. 1602.5.
171. *Id.* arts. 1602.1, 1602.2.
172. *Id.* art. 1602.6.
173. *Id.* art. 1602.7.

(c) prior notification of the proposed treatment is given in accordance with [the terms of the FTA].[174]

This exception is also contained in the chapter dealing with services. The purpose of such an exception is to permit a Party to require that a proposed investment not violate legitimate policy goals concerning public health and welfare.

In response to some of the demands made for undertakings by American investors in Canada under FIRA prior to 1985, the FTA directly rules out the imposition by either Party of significant trade-distorting performance requirements such as minimum export levels, import substitution, local sourcing, and domestic content requirements.[175] Additionally, the FTA provides that neither Party shall impose any of the foregoing performance requirements on an investor from a third country where meeting the requirement could have a significant impact on trade between the two countries.[176]

A significant breakthrough for the United States requires Canada to increase review thresholds under the ICA for direct and indirect acquisitions and ultimately eliminate them in the case of indirect acquisitions.[177] Under the FTA the ICA is to be amended to provide that the gross asset threshold for review by Canada of direct acquisitions by American investors of a Canadian business will be increased from Can $5 million to Can $25 million on the date of implementation of the FTA, to Can $50 million on the first anniversary of such date, to Can $100 million on the second anniversary, and to Can $150 million on the third anniversary. From the fourth anniversary forward the gross asset threshold for review would be Can $150 million in constant third anniversary year dollars.

The threshold for review of indirect acquisitions by an American investor of a Canadian business will be increased from Can $50 million to Can $100 million on the date of implementation of the FTA. This figure will be further increased on the first anniversary of such date to Can $250 million and to Can $500 million on the second anniversary date. From the third anniversary date forward, indirect acquisitions by American investors of Canadian firms will not be reviewable by Investment Canada.

Canada has also agreed that these monetary thresholds will apply to acquisitions by third-country investors in Canadian firms controlled by U.S. investors.[178] This provision will result in greater freedom for Americans than for other foreign investors, including Canadians, to dispose of

174. *Id.* art. 1602.8.
175. *Id.* art. 1603.1.
176. *Id.* art. 1603.2.
177. *Id.* annex 1607.3.
178. *Id.*

their investments in Canada. As a result, this provision has attracted criticism in Canada as constituting an unfair preference for American investors.[179]

These amendments to ICA restrictions, however, do not apply in respect of the oil and gas uranium mining industries.[180] These industries are to be subject to published policies that are to be implemented through the review process under the ICA, provided that such policies are not more restrictive than those in effect on October 4, 1987.[181] The Parties agreed that prior to introducing legislation to implement the FTA, they would, through an exchange of letters, delineate those policies.

The FTA provides that neither country shall, directly or indirectly, nationalize or expropriate an investment in its territory by an investor of the other country except for a public purpose, in accordance with due process of law, on a nondiscriminatory basis, and upon payment of prompt, adequate, and effective compensation at fair market value.[182] The FTA provides for the free transfer of profits and other remittances subject only to certain exceptions relating to bankruptcy, criminal offenses, reports of currency transfers, withholding taxes, issuing, trading or dealing in securities, or ensuring the satisfaction of judgments.[183]

It is important to note that the Parties have also agreed that all existing laws, regulations, and published policies and practices, or continuation or renewals thereof, not in conformity with any of the obligations under the investment chapter of the FTA are to be grandfathered.[184]

The dispute resolution mechanism of the FTA is not applicable to any decision made by Investment Canada under the ICA with respect to whether to permit an acquisition that is subject to review.[185] Non-ICA investment disputes are to be resolved by the dispute settlement provisions of the FTA. The Parties and their investors shall retain their respective rights and obligations under customary international law with respect to portfolio and direct investment not covered by the investment chapter. Additionally, the Parties agree that the investment chapter shall not affect the rights and obligations under the GATT or any other international agreement to which both countries are parties.

The investment chapter does not apply to any new taxation measures or any subsidy, provided such measure or subsidy does not constitute a

179. Hayden, *Free Trade Unfair to Non-American Investors*, in FOREIGN INVESTMENT IN CANADA 2317 (1987).
180. FTA, *supra* note 1, annex 1607.3.
181. *Id.*
182. *Id.* art. 1605.
183. *Id.* art. 1606.
184. *Id.* art. 1607.
185. *Id.* art. 1608.

means of arbitrary or unjustifiable discrimination between investors of the Parties or a disguised restriction on the benefits accorded to investors under this chapter of the FTA.[186]

The investment provisions of the FTA do not apply to any measure affecting investments related to:

(a) the provisions of financial services [with exceptions];
(b) government procurement; or
(c) the provision of transportation services [marine, air, trucking, rail, and bus modes].[187]

As such, the relaxed ICA thresholds will not apply to review in these areas, and the current levels of $5/$50 million would be operative, although other Canadian and provincial government policies specifically tailored to each such area usually are the most influential in the ICA review process.

XII. Exemption of Cultural Industries

Cultural industries are exempted from the FTA in general, including provisions relating to regulation of foreign investment in Canada.[188] The definition of these excluded cultural industries is generally consistent with the existing "cultural heritage, national identity" category under the ICA (although the italicized words below are not currently contained in the ICA definition) and includes an enterprise engaged in any of the following activities:

(a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form *but not including the sole activity of printing or typesetting any of the foregoing,*
(b) the production, distribution, sale or exhibition of film or video *recordings,*
(c) the production, distribution, sale or exhibition of audio or video music recordings,
(d) the publication, distribution, or sale of music in print or machine readable form, or
(e) *radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertaking and all satellite programming and broadcast network services.*[189]

186. *Id.* art. 1609.
187. *Id.* art. 1601.2.
188. *Id.* art. 2005.1.
189. *Id.* art. 2012.

Canada has undertaken in the event of a divestiture of an indirect acquisition by an investor from the United States in the cultural sector, to offer to purchase the business at a fair, open market value as determined by independent, impartial assessment.[190] The United States, while acknowledging Canadian sensitivities to its cultural heritage, has reaffirmed the importance of ensuring that Canadian policies do not constitute discriminatory barriers to U.S. trade with Canada. It has reiterated its understanding that in return for the exemption of certain cultural areas from the FTA, Canada has agreed that its cultural policies will not impair the benefits the United States would otherwise expect under the FTA. The Parties have further agreed that each may take measures of "equivalent commercial effect" in response to actions taken by the other under the authority of the exclusion for cultural industries if such actions would otherwise have been inconsistent with the FTA.[191]

XIII. Financial Services

A. The Negotiations

In the bilateral trade negotiations the United States attached priority to the negotiation of a framework of rules relating to trade in financial services. The American financial community perceived a significant trade barrier in Canadian federal and provincial regulation of financial institutions, which it viewed as an impediment to the American export of financial services to Canada. Despite Canada's various moves towards deregulation of its financial markets, the perception in the United States at the outset of the free trade negotiations was that the federal Canadian Government had made no improvement in the treatment of foreign banks in recent years.[192] American institutions concluded that the combined effect of capitalization limits, restrictions on off-shore funding, and prudential lending limits imposed a severe restriction on American financial services in Canada, prohibiting full and fair competition in the Canadian marketplace. Other financial service "issues" that the American firms discussed in the negotiations related to Canadian limitations on nonresident ownership of financial institutions to 25 percent of the capital stock with no one individual nonresident being permitted to own more than 10 percent. Finally, concern existed over restrictions that allegedly discriminated against a foreign bank's ability to offer competitive full service banking in Canada.

190. *Id.* art. 1607.4.

191. *Id.* art. 2005.2.

192. For a detailed discussion of irritants and items each country wanted liberalized in the free trade negotiations, see Levitt & Battram, *Canada/United States Trade in Financial Services*, 3 J. Int'l Banking L. 159 (1987).

Before the enactment in the United States of the International Banking Act of 1978,[193] Canadian banks had the right to conduct banking operations in more than one state and to operate securities affiliates. The International Banking Act required that foreign banks be placed on an equal footing with American banks. Although the operations of existing branches and existing nonbank activities were grandfathered, concern in Canada existed not only over these restrictions but on potential future limitations on these grandfathered rights. In addition to barriers restricting Canadian operations from expanding in various states and limiting their ability to access certain commercial markets, Canadians felt that government agencies at both the federal and state levels systematically discriminated against Canadian banks operating in the United States.

B. Financial Services Aspects of the FTA

The FTA states that each Party will, to the extent provided in the FTA, accord national treatment with respect to investment and trade in goods and services.[194] However, the concept of national treatment for financial services proved to be unachievable during the negotiations because of inherent differences in the nature of the regulatory system between the Parties. As such, national treatment is not applicable to financial services other than insurance services.

In summary, the financial services chapter[195] addresses certain statutory matters and grandfathers existing market access in each country. Financial services stand alone from the rest of the FTA and this chapter constitutes the entirety of the financial services agreement between the Parties.[196] As such, the other provisions of the FTA such as investment, government procurement, and dispute resolution do not apply to financial services. The insurance industry is the exception because it is covered under the general services chapter.[197] It provides that insurance services, segregated and other fund services managed by insurance companies, and insurance agency and brokering are subject to the concept of national treatment at both the federal and provincial level. The relaxed provisions for ICA review and the dispute settlement mechanism are applicable to insurance services.

Under the key elements of the financial services chapter, Canada has agreed that U.S. nationals and U.S. controlled companies will receive

193. 12 U.S.C. §§ 3101-3108 (1982 & Supp. IV 1987).
194. FTA, *supra* note 1, art. 105.
195. *Id.* ch. 17.
196. *Id.* art. 1701.
197. *Id.* ch. 14, annex 1408.

treatment as favorable as that which Canadian nationals receive with respect to their ability to purchase shares of Canadian controlled financial institutions.[198] This provision will exempt American investors from federal Canadian nonresident ownership restrictions. In relation to banks, the 25 percent ceiling on total nonresident shareholdings will not apply to American investors, but the 10 percent limit on shares held by one person will remain. For insurance, trust and loan, and investment company legislation, the 10 percent limit applies only to nonresidents, and as such would no longer apply to Americans. Provincially incorporated financial institutions are specifically exempt. The FTA is not clear as to how non-Americans will be treated under the ownership ceiling once the FTA is implemented. For example, will American investors be included for the purposes of calculating the nonresident 25 percent ceiling?

Secondly, Canada has agreed to exempt U.S. bank subsidiaries, individually and collectively, from the limitations that restrict total foreign-controlled bank assets in Canada to 16 percent of total bank assets.[199] The 16 percent limitation of total assets of banks on the authorized capital of Schedule B banks will be removed for American-controlled bank subsidiaries. The FTA is not clear as to whether American bank investment will be included when calculating the 16 percent ceiling for other foreign banks. American-controlled banks are exempted from the Bank Act provision that authorizes capital limits of Schedule B banks, which, along with specified capital-asset ratios, has effectively limited asset growth.[200] American-controlled Schedule B banks are also exempted from the necessity of having to apply to the Minister of Finance (Canada) for permission to open additional branches.[201] In addition, Canada has agreed to permit American-controlled banks to transfer loans to their parents subject to normal prudential requirements.[202]

Thirdly, Canada has agreed not to use review powers governing the entry of U.S. controlled financial institutions in a manner inconsistent with the aims of the financial services chapter.[203]

In return, the United States has agreed that Canadian banks would be permitted to engage in the dealing in, underwriting, and purchasing of securities in the United States provided such activity is backed by the Canadian equivalent of the "full faith and credit" of Canada, its provinces, or political subdivisions.[204] The "full faith and credit" of Canada includes

198. *Id.* art. 1703.1.
199. *Id.* art. 1703.2(a).
200. *Id.* art. 1703.2(b).
201. *Id.* art. 1703.2(c).
202. *Id.* art. 1703.2(d).
203. *Id.* art. 1703.3.
204. *Id.* art. 1702.1.

not only government issued bonds, but also debts of its agents such as Crown Corporations, provided that the debt is fully guaranteed by the government.

Secondly, the United States has agreed not to adopt or apply any measure that would diminish current interstate branching rights of Canadian-controlled banks.[205] The FTA effectively "freezes" grandfathering benefits for Canadian-controlled banks to those existing on October 4, 1987.

Thirdly, the United States has agreed to accord the Canadian financial institutions the same treatment as that accorded to United States financial institutions with respect to any amendments to the Glass-Steagall Act.[206]

In general, the financial service provisions of the FTA fall short of both Parties' objectives for the liberalization of financial services. The Parties have agreed to provide each other's financial institutions the rights and privileges they currently have subject to the caveats of normal regulatory and prudential considerations.[207] More importantly, the Parties have agreed to consult and liberalize further the rules governing their respective markets.

XIV. Institutional Provisions

The FTA improves on earlier trade agreements entered by the United States, including those under GATT, by providing dispute resolution mechanisms that can produce a binding result within a limited time.

The institutional provisions apply to all disputes concerning the interpretation or application of the FTA. They also cover situations in which a Party believes that an actual or proposed measure of the other Party is or would be inconsistent with the FTA, or would cause nullification or impairment of benefits reasonably expected to accrue to the complaining Party under the FTA.[208] The only exceptions are the financial services provisions of the FTA,[209] the chapter dealing with anti-dumping and countervailing duty cases,[210] and instances in which the Parties agree to use a different procedure. Where the GATT procedure is also applicable, the complaining Party has a choice of forum,[211] but it cannot change its mind after one procedure has been initiated.[212]

205. *Id.* art. 1702.2.
206. *Id.* art. 1702.3.
207. *Id.* arts. 1702.4, 1703.4.
208. *Id.* art. 1801.1.
209. *Id.*
210. *Id.*
211. *Id.* art. 1801.3.
212. *Id.*

The FTA procedures involve four main elements: consultation, the Canada-United States Trade Commission (the Commission), arbitration, and panel procedures.

A. Consultation

A Party must give the other written notice, as early as possible, of any proposed or actual measure that it considers might materially affect the operation of the FTA.[213] "Measure" includes any law, regulation, procedure, requirement, or practice.[214] The Party must also provide information and answer questions about a measure, whether or not it was the subject of a prior notification.[215] A Party may request consultations concerning any actual or proposed measure, or any other matter that it considers affects the operation of the FTA.[216] If consultation does not resolve the matter within thirty days of the request for consultation, either Party can make a written request for a meeting of the Commission.[217]

B. The Commission

The Commission is charged with supervising the implementation and development of the FTA, as well as the resolution of disputes.[218] It is to consist of representatives of both Parties, the principal representative of each being the cabinet-level officer primarily responsible for international trade, or his or her designee.[219]

When a Party requests a meeting of the Commission following the failure of consultations to resolve a dispute, the Commission must, unless the Parties otherwise agree, meet within ten days to try to resolve the dispute promptly.[220] The Commission is master of its own procedure, but can make decisions only by consensus.[221] It may call on the assistance of a mediator acceptable to both Parties.[222] If the Commission is unable to resolve the dispute within thirty days after referral, then either the Commission or the Parties may use the arbitration or panel procedures.[223] If the dispute relates to emergency action provisions under the FTA, the

213. *Id.* art. 1803.1.
214. *Id.* art. 201.1.
215. *Id.* art. 1803.3.
216. *Id.* art. 1804.1.
217. *Id.* art. 1805.1.
218. *Id.* art. 1802.1.
219. *Id.* art. 1802.2.
220. *Id.* art. 1805.1.
221. *Id.* art. 1802.5.
222. *Id.* art. 1805.2.
223. *Id.* art. 1806.1.

Commission must refer the dispute to arbitration.[224] In other cases, the Commission has the discretion to refer the dispute to arbitration, but if it does not, then a Party can invoke the arbitration panel procedures.[225]

C. Arbitration

The FTA provides for "binding arbitration on such terms as the Commission may adopt," although certain features are specified.[226] The arbitration panel is to consist, when possible, of panelists from both countries, drawn from a standing roster of individuals chosen on the basis of their objectivity, reliability, and sound judgment.[227] When possible, members of the roster are to have expertise in the particular type of matter under consideration.[228] Panelists must not be affiliated with or take instructions from either Party.[229]

Within fifteen days of the establishment of the panel, each Party must, in consultation with the other Party, nominate two members to the panel.[230] The Commission will then attempt to agree on the fifth, the Chairman. Absent such agreement, the four appointed panelists must, at the request of either Party, choose the fifth panelist within thirty days of the establishment of the panel. Failing such a choice, the fifth member will be selected by lot from the roster.[231]

The panel establishes its own procedures, except where the Commission has agreed otherwise. The procedures, however, must give each Party at least one hearing before the panel, and the opportunity to make written submissions and arguments in rebuttal.[232]

The findings of a binding arbitration panel must be implemented in a timely fashion.[233] If a Party fails to comply, and the Parties cannot agree on compensation or remedial action, then the other Party can suspend the application of equivalent benefits under the FTA.[234]

D. Panel Procedures

If the Commission has not resolved a dispute within thirty days, or within an agreed extended period, and the dispute has not been referred

224. *Id.*
225. *Id.* art. 1807.2.
226. *Id.* art. 1806.1.
227. *Id.* art. 1807.1.
228. *Id.*
229. *Id.*
230. *Id.* art. 1807.3.
231. *Id.*
232. *Id.* art. 1807.4.
233. *Id.* art. 1806.3.
234. *Id.*

to arbitration, either Party can insist on the establishment of a panel of experts to consider the matter.[235] The rules as to the constitution and procedure of a panel of arbitrators, outlined above, also apply to panels of experts, but panels of experts are subject to certain further provisions. The panel must present to the Parties within three months an initial report containing: (a) its factual findings; (b) its decision as to whether the disputed measure would be inconsistent with the FTA or cause nullification or impairment of benefits reasonably expected to accrue under it to the complaining Party; and (c) any recommendations for resolving the dispute.[236] The Parties must, where feasible, be given a prior opportunity to comment on the findings of fact.[237] The preliminary report must also, if a Party has so requested, include findings as to the degree of adverse trade effect on the other Party of any measures found to be contrary to the FTA.[238] Once the panel has issued its initial report, the Parties have fourteen days to present to the Commission and to the panel written, reasoned statements of any objections. At that stage, the panel may request further reviews from the Parties, make any further examination it thinks appropriate, and revise its report.[239] The panel must issue its final report within thirty days of the issue of the initial report, and the report will be made public unless the Commission agrees otherwise.[240]

The Commission has thirty days (or such other period as it may agree) from the receipt of the final panel report to agree on the resolution of the dispute, which must normally conform with the panel's recommendation.[241] Whenever possible, the resolution is to be nonimplementation or removal of the offending measure, failing which, compensation.[242] If the Commission does not reach a resolution within the specified period, and a Party considers that its fundamental rights or benefits under the FTA are or would be impaired by the measure, it can suspend the application to the other Party of benefits or equivalent effects until the dispute is resolved.[243]

E. Generally

In the United States the dispute resolution procedures in the FTA will be initiated by the USTR, either on his or her own initiative or following

235. *Id.* art. 1807.2.
236. *Id.* art. 1807.5.
237. *Id.*
238. *Id.*
239. *Id.* art. 1807.6.
240. *Id.*
241. *Id.* art. 1807.9.
242. *Id.* art. 1807.8.
243. *Id.* art. 1807.9.

a petition by an interested party under section 301 of the Trade Act of 1974.[244] During the course of the procedures, the USTR will seek information and advice from the private sector, including any petitioner, in relation to the dispute.[245]

Unlike the GATT procedures, the FTA dispute settlement provisions do not rely on consensus. Although consensus may operate at certain points (such as in deciding whether to send a dispute not relating to emergency action to binding arbitration), at each stage a default provision enables the procedure to continue. Ultimately, the mechanism will lead to a finding in favor of one Party or the other and, absent agreement on remedial action, an injured Party will ultimately be entitled to suspend benefits of equivalent effect.[246]

XV. Binational Panel Dispute Settlement in Anti-Dumping and Countervailing Duty Cases

Canada has numerous regional assistance programs designed, inter alia, to encourage trade in disadvantaged areas by providing such incentives as tax breaks and low interest loans. Consequently, the United States has initiated numerous anti-dumping and countervailing duty investigations of Canadian products. Since a total exemption for Canadian products from the United States anti-dumping and countervailing duty laws was unacceptable to the United States, the FTA contains an agreement to seek a solution, together with certain interim measures.

A. The Working Group

The FTA provides for the establishment of a Working Group to try to develop new rules dealing with unfair pricing and government subsidies, as well as to consider any problems arising out of the implementation of the dispute settlement mechanism.[247] The Parties agree to use their best efforts to settle and implement a new system within five years, subject to an automatic two-year extension.[248] If they do not succeed, either Party can terminate the FTA by giving six months' notice.[249]

Parts of the proposed United States implementing legislation gave rise to controversy. The Senate Finance Committee initially supported a proposal that would allow American producers to petition the United States Government to monitor Canadian subsidies, in order to determine whether

244. 19. U.S.C. § 2411 (1982).
245. Statement of Administrative Action, *supra* note 22, at 94.
246. FTA, *supra* note 1, art. 1807.
247. *Id.* art. 1907.
248. *Id.* art. 1806.
249. *Id.*

the subsidies should be subject to trade action.[250] The proposed language would have encouraged the United States administration to invoke section 301[251] and the countervailing duty law against Canadian subsidies. Following objections from the Canadian Government, which felt that Canada was being singled out, a compromise was reached whereby imports from all countries benefiting from future trade agreements would be monitored.

The United States legislation makes it a negotiating objective for the Working Group, so far as the United States is concerned, to pay special attention to Canadian subsidies that adversely affect directly competing American industries. The Working Group is required to consult with Congress and the private sector, and to make annual progress reports to the Senate Finance Committee and the House Ways and Means Committee. Any proposed agreement produced by the Working Group is to be given fast track consideration only if the President determines that it provides more discipline over subsidies, and no less discipline over unfair pricing practices, than under the Subsidies and Anti-Dumping Codes of the GATT, and that it will not undermine existing multilateral discipline or detract from the Uruguay Round negotiations.

In the meantime, the FTA restricts any modifications the parties may make to their anti-dumping and countervailing duty laws. It also provides for a binational panel to replace current domestic procedures for review of anti-dumping and countervailing duty determinations. These provisions are discussed below.

B. Review of Statutory Amendments

The Parties reserve the right to continue to apply their anti-dumping and countervailing duty laws to goods from each other's territory.[252] However, changes to those laws, including administrative practice and judicial precedent as well as statutes and regulations, are restricted.[253] Any amendment will apply to goods from the other Party only if its says so specifically.[254] A Party must provide advance notification of consultation on any amendment, and the amendment must not be inconsistent with GATT, the Anti-Dumping Code, the Subsidies Code, or the object or purpose of the FTA.[255] The chapter states that the FTA's object and purpose is to be ascertained from its provisions, preamble, and the prac-

250. *See* Staff of Senate Comm. on Finance, 100th Cong., 2d Sess., Report on First Phase of U.S.-Canada Free Trade Agreement (Press Release No. M-8, May 18, 1988).
251. 19 U.S.C. § 2411 (1982).
252. FTA, *supra* note 1, 1902.1.
253. *Id.* art. 1902.2.
254. *Id.*
255. *Id.*

tice of the parties, and is to "establish fair and predictable conditions for the progressive liberalization of trade between the two countries while maintaining effective disciplines on unfair trade practices."[256]

If either Party amends its law, the other Party can require that the matter be referred to a panel for a declaratory opinion as to whether the amendment is consistent with GATT, the Codes, and the FTA's object and purpose.[257] As in the case of the institutional dispute settlement provisions, such a panel is to consist of five persons, selected if possible from a binational fifty-person roster made up equally of United States and Canadian citizens.[258] These citizens must be of good character, high standing, and repute, and chosen strictly on the basis of objectivity, reliability, sound judgment, and general familiarity with international trade law.[259] They must not be affiliated with, or take instructions from, either Party.[260] Judges are deemed to be nonaffiliated.[261] The majority on any panel, including the chairman, must be lawyers in good standing, and a code of conduct is to be established by an exchange of letters.[262]

The FTA establishes a procedure and timetable for establishing panels, including provision for four peremptory challenges for each Party and a maximum time limit of sixty-one days.[263] Panelists are required to sign protective orders and undertakings in respect of confidential, personal, business, proprietary, and other privileged information.[264] The Parties must establish sanctions for breaches.[265]

Panels will establish their own rules of procedure, unless the Parties have first agreed otherwise.[266] However, certain minimum requirements are laid down, including a right to at least one hearing for each Party, an opportunity to provide written submissions and rebuttal arguments, and an opportunity to provide a written, reasoned statement of objections within fourteen days of the issue of the panel's initial declaratory opinion.[267]

If the panel's final report recommends changes to the amending statute, the Parties have ninety days to reach a resolution by consultation.[268] If no suitable re-amending legislation, or other agreed remedy, has been

256. *Id.*
257. *Id.* art. 1903.1.
258. *Id.* annex 1901.2.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*, annex 1903.2.
267. *Id.*
268. *Id.* art. 1903.

implemented within nine months from the end of the consultation, the aggrieved Party has the option of taking comparable retaliatory action or giving sixty days' notice to terminate the FTA.[269] The United States takes the view that retaliatory action is restricted to equivalent action within a Party's anti-dumping or countervailing duty laws.[270]

C. Review of Final Anti-Dumping and Countervailing Duty Determinations

The second interim measure is the replacement of domestic review of final anti-dumping and countervailing duty determinations with review by binational review panels, when imports from the other Party are in issue.[271] The panels will be established in the same way as legislative review panels, and their decisions will bind both Parties.[272] In the case of the United States, final anti-dumping and countervailing duty determinations are defined as final administrative reviews of anti-dumping and countervailing duty orders, determinations not to review an order based on changed circumstances, and determinations whether a particular type of goods is within the order.[273] The aim of the provisions is to ensure that persons seeking review of such determinations are at no disadvantage compared to their present position. The object is to preserve the same rights to review by an impartial tribunal, while moving from a domestic to a binational forum.

The qualifications for membership of a panel are the same as for legislative review panels. The panel is required to apply the standard of review that is, for each Party, the standard that applies under this domestic law, and to reach its decision on the basis of the relevant law of the importing Party.[274] The law to be applied consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents.[275] The panel must also apply the general legal principles that a court of that country would otherwise apply.[276] These principles are defined to include standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies.[277]

Either Party may request a panel review, and each is obliged to do so if requested by a person who would otherwise be entitled under its law

269. *Id.*
270. Statement of Administrative Action, *supra* note 22, at 98.
271. FTA, *supra* note 1, art. 1904.1.
272. *Id.* art. 1904.9.
273. *Id.* art. 1911.
274. *Id.*
275. *Id.* art. 1904.2.
276. *Id.* art. 1904.3.
277. *Id.* art. 1911.

to commence domestic procedures for judicial review.[278] (The United States's implementing legislation provides for the promulgation of regulations to set out the manner in which such requests are to be made.) Persons who would have the right to appear and be represented in a domestic judicial review proceeding are to have the same rights before the panel; the same is true of the investigating authority that issued the final determination.[279]

The FTA requires the Parties to adopt rules of procedure by January 1, 1989, based, where appropriate, on judicial rules of appellate procedure.[280] The rules are to cover specified matters, including the protection of business, proprietary, and other privileged information, articulation by private persons, limits on panel review, oral argument, briefs, and requests for rehearing.[281] In addition, a timetable for the procedure is laid down, resulting in a total of 315 days from the date of the request for a panel review to the issue of the panel's written decision. The panel can either sustain the decision of the agency or remand the case to it for action not inconsistent with the panel's findings.[282] The panel will specify the time allowed for the remand, which must not exceed the time permitted for the original decision.[283] If the decision on remand has to be reviewed, the review will be by the same panel.[284]

If a Party, within the time limit, requests a panel review of a final determination, that determination cannot then be reviewed under any domestic judicial review procedures.[285] In addition, neither Party may provide for an appeal from a panel decision to its domestic courts.[286] If neither Party seeks panel review of a determination, the panel procedure does not apply and domestic review procedures remain available.[287]

If either Party alleges that gross misconduct, bias, serious conflict of interest, or other material violation of the rules of conduct by a panel member, or a fundamental breach of procedure or excess of authority by the panel, has materially affected the decision and threatens the integrity of the review process, the Party can invoke the extraordinary challenge process.[288] Under this process, the matter is investigated by a binational

278. *Id.* art. 1904.2.
279. *Id.* art. 1904.7.
280. *Id.* art. 1904.14.
281. *Id.*
282. *Id.* art. 1904.8.
283. *Id.*
284. *Id.*
285. *Id.* art. 1904.11.
286. *Id.* art. 1904.12.
287. *Id.*
288. *Id.* art. 1904.13 & annex 1904.13.

committee of judges or former judges, who may either affirm the panel's decision, remand it to the panel for action not inconsistent with their determination, or vacate the decision. If the committee vacates the decision, a new panel must be established.[289]

Some points remain unclear. The FTA does not deal specifically with cases that involve more than one country. A U.S. dumping determination, for example, may be reviewed and remanded both by a panel, insofar as the determination relates to Canada, and by a court, to the extent it relates to other countries. If the results of the reviews are different, the agency may have to apply one standard to imports from Canada and another to imports from the other countries.

The FTA states that judicial decisions of the importing country form part of the law to be applied by the panel, but does not refer to previous decisions of the panel. Arguably, then, these decisions will not form precedents that will bind future panels, even when the previous panel was applying the same domestic law as the later panel.

On the other hand, it is clear that panel decisions are not intended to affect the substantive law, or cases of imports from third countries. The U.S. implementing legislation provides that decisions of panels, or of extraordinary challenge committees, will not bind American courts as precedents. Hence, if the International Trade Commission (ITC) makes a final determination based on the aggregate effect of imports from Canada and elsewhere, a reviewing court must confine its review to the record that was originally before the ITC, and ignore any panel decisions or any subsequent ITC action resulting from a remand by a panel.[290]

D. Constitutional Issues Raised in the United States by Implementation of Chapter Nineteen

These provisions of the FTA have given rise to considerable legal controversy in the United States, centering on two questions as to the constitutionality of replacement of domestic review with review by binational panels.

1. *Article III*

The first question is whether replacement of domestic review with review by binational panels violates Article III of the United States Constitution by allowing non-Article III judges to determine cases "arising under [the] Constitution, the Laws of the United States . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

289. *Id.*

290. *See* Statement of Administrative Action, *supra* note 22, at 109.

Article III vests the power to decide such cases in the Supreme Court, and in "such inferior Courts as the Congress may from time to time ordain and establish." It goes on to state that: "In [certain special cases], the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

This provision might reasonably be interpreted to mean that, leaving aside the special cases, original jurisdiction must be vested in inferior Article III courts, with Congress free to determine the extent of appellate review by the Supreme Court. However, the Supreme Court has fairly consistently taken the opposite view, that Congress need not create any inferior Article III courts, and thus that it has discretion to let non-Article III courts decide Article III cases.[291]

Two possible limitations on this principle have emerged. One derives from *Northern Pipeline Co. v. Marathon Pipe Line Co.*,[292] which held that federal bankruptcy judges (who are not Article III judges) cannot determine certain types of disputes. While suggesting that some types of dispute must be heard by Article III courts the plurality in *Northern Pipeline* held that no such requirement governed disputes over "public rights." The Supreme Court's remarks in a later case, *Thomas v. Union Carbide Agricultural Products Co.*,[293] indicate that international trade cases are "public rights" cases. This decision disposes of any objection to Chapter Nineteen based on *Northern Pipeline*.

The second possible limitation is that Congress may not use its power over the federal courts' jurisdiction to deprive persons of their constitutional rights.[294] Recent cases have strongly suggested that constitutional claims must sooner or later be heard by an Article III court.[295] The implementing legislation solves this problem by excluding constitutional claims arising in trade cases involving Canada from the binational review procedures. Such claims may be raised in court, although a special judicial procedure is established for such claims. (A second special procedure is also established for constitutional challenges to the panel procedure itself.)

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291. *See, e.g.*, Palmore v. United States, 411 U.S. 389, 401 n.9 (1972); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); Turner v. Bank of N. Am., 1 U.S. (4 Dall.) 7, 8 (1799).

292. 458. U.S. 50 (1982).

293. 473 U.S. 568 (1985).

294. *See e.g.*, Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.) (the congressional exercise of plenary power in this area must not "deprive any person of life, liberty, or property without due process of law or take private property without due process of law or take private property without just compensation"), *cert. denied*, 335 U.S 887 (1948).

295. *See* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 & n.12 (1986); Johnson v. Robison, 415 U.S. 361, 366 (1984); Bartlett v. Bowen, 816 F.2d 695, 793 (D.C. Cir. 1987).

2. *Article II*

The second constitutional concern is that the panel system may breach the appointments clause of Article II of the Constitution, which provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States . . . ; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[296]

In *Buckley v. Valeo*[297] the Supreme Court held that this clause applies to "any appointee exercising significant authority pursuant to the laws of the United States."[298] If the binational panel gives binding directions to U.S. agencies, its members are arguably exercising authority under U.S. law.

In an attempt to circumvent this problem, article 1904.2 of the FTA incorporates the relevant domestic laws, so that, the argument runs, the panel can exercise its authority pursuant to the FTA and not simply U.S. law. An analogy may exist with *Seattle Master Builders v. Pacific Northwest Electric Power & Conservation Planning Council,*[299] in which a Council whose members were not Presidentially appointed was held to be constitutional despite its authority over federal agencies because: "[the] Council members do not perform their duties 'pursuant to laws of the United States.' Rather, the Council members perform their duties pursuant to a compact which requires both state legislation and congressional approval. Without substantive state legislation, there would be no Council and no Council members to appoint."[300]

It is arguable, however, that the relevant power of the binational panel, namely the power to make determinations that are binding on private persons as a matter of U.S. law, can only derive from U.S. law, and that the creation of parallel international obligations is irrelevant. Presumably for this reason, the United States Government wished to give the President power to direct the relevant U.S. authorities (the Commerce Department, the ITC, and the Customs Service) to ignore panel decisions. If U.S. agencies are not bound to follow the panels, then panel members have no formal authority and need not be Presidentially appointed. But this raised the specter of political interference in trade cases, something Congress found unpalatable. In the end, the Administration reached a somewhat untidy compromise with Congress, under which panel decisions are

296. U.S. CONST. at. II, § 2, cl. 2.
297. 424 U.S. 1 (1976).
298. *Id.* at 126.
299. 786 F.2d 1359 (9th Cir. 1986).
300. *Id.* at 1365 (citations omitted).

to be automatically binding unless a successful constitutional challenge to the provisions is mounted. In that event, a "fallback provision" gives the President "discretion whether to accept a remand decision on behalf of the United States."

To obtain this discretion, however, the President had to promise not to use it. The Administration has stated its intent to issue an Executive Order agreeing in advance to accept all panel decisions. (This action will be of more symbolic than legal importance: as with any Executive Order, it can be revoked by the same or any future President.) In fact, the "fallback" is unlikely to be of any but academic interest. The courts will be reluctant to overturn provisions resulting from an international agreement negotiated by the President and approved by both Houses of Congress.

XVI. Conclusion

During the last twenty years North American productivity growth rates have fallen behind some other developed nations. If implemented fully, the FTA may be the "spark" that will reverse this trend; the removal of trade and economic barriers between the Parties will likely serve to rationalize their manufacturing bases and improve productivity. At a minimum it has already provoked the most profound debate over the Canada-United States relationship that has been seen in the postwar era.